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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

Term,

No.

JOHN LaGUARDIA,
Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF PENNSYLVANIA

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QUESTIONS PRESENTED

I. Was Petitioner denied his Sixth Amendment right to a fair and impartial jury by the prosecution's closing argument, that the most critical evidence in the case against Petitioner was a question asked by defense counsel?

II. Was Petitioner denied his Sixth Amendment right to produce witnesses on his behalf by the trial court's refusal to grant a short delay to enable Petitioner to enforce an order under the Interstate Rendition of Witness Act?

III. Did the trial court shift the burden of proof from the Commonwealth to the Petitioner by commenting in the presence of the jury that the Petitioner could call his father as a witness to prove ownership of certain seized guns?

TABLE OF CONTENTS

	Page
PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA	1
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	3
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	7
CONCLUSION	11
APPENDIX A—Opinion and Order of the Court of Common Pleas of Mercer County, Pennsylvania, denying Defendant's Post-Trial Motions	1a
APPENDIX B—Opinion and Order of the Superior Court of Pennsylvania, affirming the Judgment of Conviction	1b
APPENDIX C—Order of the Supreme Court of Pennsylvania, denying Petition for Allowance of Appeal	1c
APPENDIX D—Certificate of Service	1d

TABLE OF CITATIONS

CASES

Page

Baker v. Hudspeth, 129 F.2d 779, 10th C., 1942 7

Deutch v. United States, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963, (1961) 8

In Re Winship, 297 U.S. 362, 90 S.Ct. 1068 10

Irvin v. Dowd, 366 U.S. 717, 81 S.Ct. 1639, 1646, 6 L.Ed.2d 751, 1961 8

Washington v. State of Texas, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, 1967 9

UNITED STATES CONSTITUTION

Amendment VI 2

Amendment XIV 3

STATUTES

Title 18, Purdon's Statutes, Section 903 ..... 4, 5

Title 18, Purdon's Statutes, Section 2702 ..... 3, 5

Title 18, Purdon's Statutes, Section 2705 ..... 4, 5

Title 35, Purdon's Statutes, Section 780-113(a)(30) 4, 5

Title 28, United States Code, 1257(3) 2

AUTHORITIES

Federal Jury Practice and Instruction, Devitt and Blackman, Volume I, Section 10.01 8

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PETITION FOR WRIT OF CERTIORARI TO
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Your Petitioner, John LaGuardia, prays that a Writ of Certiorari issue to review the Judgment of The Supreme Court of Pennsylvania entered in the above-captioned case.

OPINIONS BELOW

An opinion was rendered by the Court of Common Pleas of Mercer County, Pennsylvania, denying Petitioner's post-trial motions. Said opinion is not reported but is set forth herein at Appendix A.

An opinion affirming the Court of Common Pleas' judgment of conviction was rendered by the Superior Court of Pennsylvania on July 30, 1982. Said opinion is not reported but is set forth at Appendix B.

On November 5, 1982, the Supreme Court of Pennsylvania denied Petitioner's Petition for Allowance of Appeal. A copy of that Order is set forth at Appendix C.

JURISDICTION

The order of the Pennsylvania Supreme Court denying the Petition for Allowance of Appeal was filed on November 5, 1982. Pursuant to Rule 20 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within sixty days after the entry of the Pennsylvania Supreme Court's final order.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1257(3).

QUESTIONS PRESENTED

I. Was Petitioner denied his Sixth Amendment right to a fair and impartial jury by the prosecution's closing argument, that the most critical evidence in the case against Petitioner was a question asked by defense counsel?

II. Was Petitioner denied his Sixth Amendment right to produce witnesses on his behalf by the trial court's refusal to grant a short delay to enable Petitioner to enforce an order under the Interstate Rendition of Witness Act?

III. Did the trial court shift the burden of proof from the Commonwealth to the Petitioner by commenting in the presence of the jury that the Petitioner could call his father as a witness to prove ownership of certain seized guns?

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the Constitution of the United States provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the Assistance of Counsel for his defense.

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

Title 18, Purdon's Statutes, Section 2702 provides as follows:

> §2702 Aggravated assault
>
> (a) Offense defined.—A person is guilty of aggravated assault if he:
>
> (1) attempts to cause serious bodily injury intentionally, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life;
>
> (2) attempts to cause or intentionally, knowingly or recklessly causes serious bodily injury to a police officer making or attempting to make a lawful arrest;
>
> (3) attempts to cause or intentionally or knowingly causes bodily injury to a police officer making or attempting to make a lawful arrest; or

(4) attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.

Title 18, Purdon's Statutes, Section 2705 provides as follows:

§2705 Recklessly Endangering

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

Title 35, Purdon's Statutes, Section 780-113(a)(30) provides as follows:

(a) The following acts and the causing thereof within the Commonwealth are hereby prohibited:

(3) Except as authorized by this act, the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance by a person not registered under this act, or a practitioner not registered or licensed by the appropriate State board, or knowingly creating, delivering or possessing with intent to deliver, a counterfeit controlled substance.

Title 18, Purdon's Statutes, Section 903 provides as follows:

(a) Definition of Conspiracy.—A person is guilty of conspiracy with another person or persons to commit a crime if with the intent of promoting or facilitating its commission he:

(1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such crime or an attempt or solicitation to commit such crime; or

(2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

STATEMENT OF THE CASE

History

Petitioner was arrested in Trumbull County, Ohio, on March 5, 1978, for various crimes allegedly committed a short time earlier in Mercer County, Pennsylvania. He was charged with two counts of attempted murder, three counts of aggravated assault and recklessly endangering, recklessly endangering, possession with intent to deliver cocaine, unlawful possession of a controlled substance and conspiracy.

He was tried before the Honorable Albert J. Acker and a jury in Mercer County, Pennsylvania, and on May 25, 1979, he was convicted of aggravated assault, 18 P.S. §2702, recklessly endangering, 18 P.S. §2705, criminal conspiracy, 18 P.S. §903, and possession with intent to deliver, 35 P.S. §780-113(a)(30). He was acquitted by the jury on the remaining twelve counts. Petitioner was sentenced to 4½ to 10 years in the state penitentiary.

The case was characterized as a "buy-bust" drug transaction. The Commonwealth alleged that William Frank and James Sutley, informants working for the Mercer County Narcotics Unit, arranged to buy two pounds of cocaine from Petitioner for $35,000.00 on March 5, 1978. Although he authorized the purchase, Chief Lenzi of the Narcotics Unit testified that he did not have the money to complete the transaction so he called a businessman to get the cash. The businessman allegedly called was informant Frank's brother. He did not testify.

On March 5, 1978, William Frank allegedly produced a bag containing $35,000.00 cash, which he gave to Chief Lenzi, who, in turn, gave it to informant Sutley.

Sutley then met with Petitioner and a co-defendant, Patrick Harbison, in a hotel parking lot to complete the alleged transaction. It was not certain whether Petitioner was to have

the cocaine with him at the meeting or have it somewhere nearby, but Sutley was to signal the police by lighting a match when he was sure Petitioner had the drugs. After a few minutes in the car, Sutley did light a match, although Petitioner did not have the two pounds of cocaine in the car. Other than a very small amount, no cocaine was ever recovered.

The police, seeing the signal, came in with guns drawn to make an arrest. Petitioner's car pulled away quickly, guns were fired and a high-speed chase from the parking lot to Trumbull County, Ohio, ensued.

After Petitioner was arrested, a deputy sheriff from Trumbull County, Ohio, said he found the $35,000.00 in the car and turned it over to Lieutenant Whiteside, his superior.

When Petitioner learned this, he contacted Lt. Whiteside, who said he never saw or received any money from anyone that night or anytime. He was retired from the Sheriff's Department at that time, however, and he refused to appear in court voluntarily. Petitioner obtained an order under The Interstate Rendition of Witnesses Act to compel Lt. Whiteside's appearance, but the court refused to delay the trial to enable Petitioner to enforce the order (A. 450a, 450b)

Petitoner testified in his own behalf and denied knowledge of any drug transaction and denied that he or anyone in his car fired a gun that night. He said that he did not own any guns.

In rebuttal, the Commonwealth presented a police officer who testified that he searched the apartment where Petitioner and his father lived and found a number of guns.

On cross-examination, defense counsel asked the officer if at the time the guns were found, Petitioner's father did not say the guns were his.

The court sustained an objection to the question and said the father was in court and was available to be called. Petitioner did not call his father as a witness. (A. 592, 593)

When Petitioner was returned to Mercer County to stand trial on these charges, he retained Attorney Herman Rogers of Sharon, Pennsylvania, to represent him. The District Attorney moved to disqualify Mr. Rogers because he had previously represented the informant, William Frank. A hearing was held and briefs submitted on this motion. Throughout his brief, Mr. Rogers referred to William Frank as Willie.

During his cross-examination of Chief Lenzi, the new counsel for Petitioner referred to William Frank as Willie Frank. Subsequently, there was testimony by Frank that he used the name Willie in a meeting with Petitioner.

In her closing to the jury, the District Attorney argued that the jury could infer from counsel's use of the name Willie in his questions, that his client had given him that as the person he met with. Counsel objected that the name Willie had been used in an earlier hearing and that his questions were not evidence. The court, nevertheless, permitted the argument because it could find no reference to the name "Willie" in the transcript of the preliminary hearing. Unfortunately, the court did not review all of the pretrial record and did not review Attorney Rogers' brief where "Willie" was used throughout. (A. 594, 595)

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I.

The Sixth Amendment guarantees an accused the right to a trial by an impartial jury.

"The 'impartial jury' guaranteed by the Sixth Amendment is one which is of impartial frame of mind at beginning of trial, is influenced only by legal and competent evidence produced during trial, and bases its verdict upon evidence connecting defendant with the commission of the crime charged." *Baker v. Hudspeth,* 129 F.2d 779, 10th C., 1942.

The rule that the jury is only to be influenced by answers given and not questions asked is so fundamental that it has long been a standard jury instruction.

> "Questions asked by the lawyers are not evidence, for the evidence consists of the witnesses' answers to questions." *Federal Jury Practice and Instruction*, Devitt and Blackman, Volume 1, Section 10.01.

It is recognized that counsel for either side can suggest to the jury appropriate inferences to be drawn from the evidence, but such arguments must be limited to the facts in evidence and the appropriate inferences to be drawn therefrom.

> "One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure." *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 1646, 6 L.Ed.2d 751, 1961 (concurring opinion); *Deutch v. United States*, 367 U.S. 456, 81 S.Ct. 1587, 6 L.Ed.2d 963, (1961).

The trial court's ruling, permitted the District Attorney to argue that one of the most "critical items" of evidence against Petitioner was a question that his counsel had asked, allowed the jury to consider facts that were not in evidence and to base their verdict on those facts. The ruling denied Petitioner his right to an impartial jury.

II.

> "The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a

defense. This right is a fundamental element of due process of law." *Washington v. State of Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019, 1967.

Because the testimony of the Commonwealth's witness and the Petitioner conflicted, the credibility of witnesses was the most important factor in this trial.

Of the many points on which the testimony was conflicting, none was so significant as that concerning the ownership and use of the $35,000.00.

It was the Commonwealth's contention that the $35,000.00 was obtained by them from their informant's brother for the planned drug purchase.

It was Petitioner's contention that the money belonged to Pat Harbision, his co-defendant, and was given by him to the informant Sutley. Petitioner said he never received the money from anyone and never had any agreement to do so.

Where the money came from and where it went, then, was of critical importance to Petitioner's defense.

If the money was not turned over to Lt. Whiteside and inventoried and returned to Chief Lenzi, it must have been taken by someone else and kept for his own use. Since it would make no sense to steal your own money or money for which you are personally liable, Lt. Whiteside's testimony would have supported Petitioner's testimony that the money was his co-defendant Harbison's.

Counsel for Petitioner exercised due diligence in attempting to procure the witness' presence. He contacted him as soon as he learned of him and when he determined that he would not voluntarily appear, he instituted the appropriate proceedings.

The witness could have been produced within a day or two at most as counsel had his address and phone number and a member of the Sheriff's Department said he could find him.

Because Petitioner was not given the opportunity to produce a critical witness in his defense, he was denied his Sixth Amendment right.

III.

This Court held in *In Re Winship*, 297 U.S. 362, 90 S.Ct. 1068, that the Due Process Clause protects an accused against conviction unless the State has borne the burden of proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.

By commenting in the presence of the jury that Petitioner could call his father to prove ownership of certain guns seized at the house occupied by Petitioner and his father, the court shifted the burden of proof on a critical element of the case to Petitioner.

Petitioner was charged with and convicted of, inter alia, causing bodily injury by firearms and recklessly endangering by firearms or automobile.

No weapon was ever recovered from Petitioner, however, and he testified that he did not own any firearms and did not have any the night in question.

To rebut that testimony, the Commonwealth was permitted to introduce evidence, over Petitioner's objection, that a number of guns were seized from the home Petitioner and his father shared. Petitioner attempted to elicit on cross-examination of the officer making the seizure the fact that his father had told the officer at the time the guns were seized that they were his. The court refused to permit the question and said in open court that the father was in court and could be called as a witness.

The court's comment clearly shifted to defendant the burden of proving that the guns seized were not his and were not used by him.

The jury could not help but draw a negative inference from petitioner's failure to thereafter call his father as a witness.

CONCLUSION

For the reasons discussed above, Petitioner John LaGuardia requests a Writ of Certiorari issue to review the Judgment of the Supreme Court of Pennsylvania.

Respectfully submitted,

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